STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2005
v	No. 252405 Washtenaw Circuit Court
RICO MONTEZ CHANDLER, Defendant-Appellant.	LC No. 01-001580-FC

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions for assault with intent to do great bodily harm, MCL 750.84, and carrying a weapon with unlawful intent, MCL 750.226. Defendant was sentenced as an habitual offender (third), MCL 769.11, to 7 to 20 years' imprisonment for the assault conviction and 2½ to 10 years for the weapon conviction. We affirm.

I. FACTS

Defendant used a box cutter to slice Chond Shelton's face open during a dispute that occurred in the early morning hours of October 6, 2001.

II. PRIOR INCONSISTENT STATEMENT

Defendant argues that the prosecution improperly used a witness' recorded prior inconsistent statement as substantive evidence in his closing argument. We disagree.

A. Standard of Review

At trial, defendant objected to the admission of the prior inconsistent statement on the grounds that it was more prejudicial than probative under MRE 403. This objection is different from defendant's claim on appeal that the use of the statement as substantive evidence was error. Objections to evidence must specify the same ground for challenge as the party seeks to assert on appeal. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Therefore, defendant failed to preserve this issue for appealand we review for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999).

B. Analysis

The prosecution called Tyrone Mason to testify that, while in jail with defendant, defendant solicited him to kill Shelton. Mason had earlier provided a recorded statement to a detective in which he stated that defendant solicited him to kill Shelton. The prosecution expected Mason's testimony to be consistent with this statement. It was not. Mason testified that defendant did not solicit him to kill Shelton and that he lied to the detective because he was angry at defendant for talking behind his back in jail. Mason testified that defendant simply wanted him to find Shelton and ask him why he was bringing false charges against defendant.

As a result, the prosecution used Mason's previously recorded statement that while in jail with defendant, defendant asked Mason to kill Shelton and provided Mason with a letter describing Shelton's physical appearance. The prosecution used Mason's prior inconsistent statement to show the jury that Mason was a liar, to impugn his character.

During closing argument, the prosecution referenced the letter describing Shelton's physical appearance and stated, "Ladies and gentlemen, I submit to you that Mr. Mason's testimony about what this note was for cannot be believed." The prosecution's comments were not used as substantive evidence that defendant solicited Mason to kill Shelton, but rather, the prosecution was properly arguing that the purpose of the note given to Mason by defendant was different than what Mason had testified at trial. Therefore, no plain error exists.

III. JURY INSTRUCTION

Defendant next argues that the trial court erred in not instructing the jury on the lesser included offense of aggravated assault. We disagree.

A. Standard of Review

We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

B. Analysis

The trial court did not err. The elements of aggravated assault are (1) an assault without a weapon; (2) the infliction of serious or aggravated injury; and (3) no intent to commit murder or to inflict great bodily harm. MCL 750.81a(1). Defendant was not entitled to an instruction on aggravated assault because the evidence did not support the giving of the instruction when the evidence established that the assault was accomplished with a weapon.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to convict him of carrying a weapon with unlawful intent. We disagree.

A. Standard of Review

We review a claim of insufficient evidence de novo and in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

B. Analysis

There was sufficient evidence to convict defendant of carrying a weapon with unlawful intent. Shelton testified he was cut with a yellow-handled blade. Defendant admitted that he at one time owned and carried a yellow box cutter. Defendant also admitted arguing with Shelton in the early morning hours of October 6, 2001. Shelton testified that defendant said, "I ain't going to tell you again to shut the f*** up … Say something else, I'll open up your face," and later cut him. The apartment security guard and the police testified that Shelton's face had been cut open. The police testified that Shelton was screaming "Rico cut me" when they arrived. On this record, the evidence was sufficient to support the jury's finding of guilt. *People v Jones*, 443 Mich 88, 102 n 19; 504 NW2d 158 (1993).

V. WAIVER

Finally, defendant argues that the trial court erred in instructing the jury that defendant was charged with the crime of *being* armed with a dangerous weapon with unlawful intent, instead of *going* armed in keeping with the statutory language and meaning. Defendant waived this issue by his explicit approval of the jury instruction during trial; thus, we need not review this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette

I concur in result only.

/s/ Janet T. Neff